IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

NIPPON SHINYAKU CO., LTD., Plaintiff, v. SAREPTA THERAPEUTICS, INC., Defendant.	)	C.A. No. 21-1015 (JLH) [redacted]
SAREPTA THERAPEUTICS, INC., Defendant and Counter-Plaintiff v. NIPPON SHINYAKU CO., LTD. and NS PHARMA, INC., Plaintiff and Counter-Defendants.	)	[redacted]

NIPPON SHINYAKU CO., LTD. AND NS PHARMA, INC.'S LETTER ON REPLY REGARDING REQUEST TO STRIKE CERTAIN SUPPLEMENTAL OPINIONS FROM SAREPTA'S ECONOMIC EXPERT JOHN JAROSZ

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Dated: December 2, 2024

Dear Judge Hall:

Sarepta does not contest that ¶¶14-20 of Mr. Jarosz's Second Supplemental Damages Report fall outside the scope of the Court's Order providing for the narrow production of supplemental financial information and supplementation of Opening Financial Expert Reports "related to [the] supplemental production." D.I. 597 at 2. The paragraphs should be stricken for that reason alone. *See B. Braun Melsungen AG v. Terumo Med. Corp.*, 749 F. Supp. 2d 210, 221 (D. Del. 2010) ("Parties may not use their obligation to supplement as an excuse to violate the clear terms of a Scheduling Order."). In addition, the opinions are impermissible legal conclusions, and the *Pennypack* factors favor exclusion. Sarepta's arguments to the contrary are unpersuasive.

Sarepta attempts to reframe Mr. Jarosz's new opinions as "not legal opinions, or 'opinions' at all—they instead provide context for Mr. Jarosz's damages opinions." D.I. 649 at 1. But the distinction Sarepta draws between "opinions" and "context" is one without a difference. Statements related to [redacted], [redacted] all amount to legal conclusions. *See* D.I. 641-1 at ¶¶15-20. Mr. Jarosz's interpretations of the agreements relate to the ultimate and contested legal question of whether Sarepta possessed sufficient exclusive rights to have standing to claim damages for the entirety of the damages period. Mr. Jarosz cannot provide such legal opinions. The fact that Mr. Jarosz does not rely on the agreements themselves but also his communications with [redacted]—demonstrates that he is not just parroting agreement terms to provide "context" but rather is interpreting them—with the assistance of impermissible and belatedly disclosed hearsay, which is further problematic. Sarepta is simply trying to backdoor in evidence and opinions about standing, for which it has borne the burden all along, and did not properly provide earlier in the case. Sarepta did not identify or produce the agreements, nor did it identify a witness knowledgeable about the agreement in a timely manner. It cannot now shoehorn this in via what was limited to financial supplementation.

Sarepta also attempts to deflect blame by arguing that both parties' damages experts "included similar context for the other agreements considered in their earlier reports in this case." D.I. 649 at 1. And Sarepta claims NS's expert offers "analogous" opinions. *Id.* at 2. NS disagrees with Sarepta's characterization, but regardless, that does not make the opinions Mr. Jarosz seeks to provide in ¶¶14-20 admissible. *See, e.g.*, *Castellani v. City of Atlantic City*, 2017 WL 924179, at *2 (D.N.J. Mar. 1, 2017) (chastising counsel for "point[ing] fingers at adverse counsel" when actions are challenged). To the extent Sarepta had any issue with Mr. Hosfield's opinions, it could have raised it at the appropriate time, with NS having a full opportunity to respond. Tellingly, Sarepta chose not to.

Finally, Sarepta suggests that NS "deal" with Mr. Jarosz's improper legal opinions "through cross examination at trial." D.I. 649 at 2. But, as NS noted, "the law of contract interpretation [] firmly prohibits expert testimony as to legal duties, standards or ramifications arising from a contract. Such testimony is reversible error and is not repaired by cross-examination." *North Am. Philips Corp. v. Aetna Casualty & Sur.*, 1995 WL 628447, (Del. Super. Ct. Apr. 22, 1995). Sarepta offers no response to this. Further, there is no opportunity to cross examine [redacted], as he was never properly disclosed as a fact witness and is not on Sarepta's witness list for trial.

Mr. Jarosz can provide calculations based on certain assumptions, which is what he does in ¶¶21-22, and he can state the assumptions he is making to the jury, but he cannot provide legal opinions interpreting contracts to support his assumptions.

The *Pennypack* Factors provide an additional reason to exclude Mr. Jarosz's opinions.

***Pennypack* Factor 1: Prejudice.** NS explained in its Opening Letter that its prejudice primarily stemmed from Mr. Jarosz's reliance on conversations with [redacted]. Sarepta again attempts to deflect blame, arguing that "NS had every opportunity to pursue the discovery" around [redacted] knowledge, despite the fact that Sarepta never identified [redacted] before. According to Sarepta, "NS has known about these documents and positions, including the information described in [redacted] declaration, since May." D.I. 649 at 2. Sarepta cites to just D.I. 572, but that is not notice of [redacted] specific statements upon which Mr. Jarosz now relies, nor is it notice of what Mr. Jarosz would testify about. The fact that experts may speak with party employees to gain better understanding of the facts does not mean that one party can sandbag the other by relying on surprise eleventh hour hearsay statements.

The cases upon which Sarepta relies do not say otherwise. *Bayer HealthCare LLC v. Baxalta Inc.*, 2019 WL 297039, at *2 (D. Del. Jan. 22, 2019), involved sales forecasts produced after the close of discovery but before the submission of expert reply reports. This Court found no prejudice where "Defendants also offered Plaintiff an opportunity to depose the relevant [fact] witnesses on the supplemental forecasts." *Id.* Here, Sarepta did not even disclose [redacted], let alone give NS the opportunity to depose him. *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1202 (3d Cir. 1978), is not on point because that case involved expert opinions that did not rely on undisclosed facts. Finally, again, NS does not dispute that both experts can provide "supplemental alternate calculations based on the parties' May positions" and can state the assumptions on which they rely. D.I. 649 at 3. But Mr. Jarosz cannot provide new legal opinions based on new facts.

***Pennypack* Factors 2 & 3: Possibility to Cure & Disruption.** Sarepta argues that "NS will have the opportunity to address the agreements, related positions, and Mr. Jarosz's ultimate damages opinions at trial" such that there is ample opportunity to cure with little disruption. D.I. 649 at 3. But Sarepta offers no response to NS's argument that NS will have no opportunity to cross examine [redacted]. There is no possibility to cure this at trial, and taking discovery followed by a deposition at this late stage—with the potential for introducing a new fact witness at trial—would disrupt the orderliness and efficiency of the upcoming proceeding. Sarepta took a calculated risk of not disclosing a relevant fact witness and should not be rewarded.

***Pennypack* Factor 4: Bad Faith.** Sarepta claims its procedural gamesmanship does not amount to "clear egregious examples of misconduct" and again blames NS for failing to take further discovery into opinions it had no prior notice of. D.I. 649 at 3. As noted above, this is nonsense. NS could not have sought discovery about opinions it was not on notice of.

***Pennypack* Factor 5: Importance.** Mr. Jarosz's opinions in ¶¶14-20 are not important because they are impermissible legal conclusions. If the underlying agreements are admissible at all—and they should not be, *see* D.I. 568—they need not be admitted through Mr. Jarosz. That Sarepta is now arguing they are important further supports NS's position: they were relevant and should have been disclosed long ago.

Dated: December 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 2, 2024, a copy of the foregoing, LETTER REGARDING REQUEST TO STRIKE CERTAIN SUPPLEMENTAL OPINIONS FROM SAREPTA'S ECONOMIC EXPERT JOHN JAROSZ, which was filed under seal, was served via electronic mail on the following counsel of record:

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